



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 710 OF 2017

SKEME ADVERTISING GROUP LIMITED.....1ST PLAINTIFF

PAMELA NDUKU MUTUA.....2ND PLAINTIFF

VERSUS

PRIME BANK LIMITED.....1ST DEFENDANT

KEYSIAN AUCTIONEERS & COURT BROKERS...2ND DEFENDANT

RULING

By a notice of motion dated 20th February 2019 brought under Order 17 Rule 2 of the Civil Procedure Rules, the Defendants urge the Court to dismiss the Plaintiffs' suit with costs for want of prosecution. The application is based on the grounds that since 30/11/2017 when the court delivered a ruling on an interlocutory application, the Plaintiffs have not taken any steps to progress the matter towards trial and that all indications show that the Plaintiffs are no longer interested in prosecuting the suit. They further contend that the suit property was sold in exercise of the 1st Defendant's chargee's statutory power of sale and therefore the substratum of the suit as currently framed no longer exists. Under these circumstances, the Defendants contend that the continued pendency of the suit is prejudicial to the Defendants.

The application is further based on facts set out in the affidavit sworn by Mutua Molo, an advocate for the Defendants, who deponed that the matter was last in court on 30/11/2017 when the court dismissed the Plaintiffs' interlocutory application for injunction and directed that the suit be listed for pre-trial directions on 20th February 2018. Since then, the Plaintiffs have not taken any steps to progress the suit. When the matter came up for pre-trial directions on 20/2/2018, 5/4/2018, 18/10/2018 and 20/2/2019, the Plaintiffs' counsel failed to attend court despite having been duly served.

The deponent further deponed that he believed that the Plaintiffs have lost interest in the case and also that he was informed by the Defendants that following the ruling of the court on 30/11/2017 the suit property was sold at a public auction on 1/12/2017 to Chrispus Maghanga Mwandembe in exercise of the 1st Defendant's chargee's statutory power of sale as shown in the memorandum of sale and certificate of sale and therefore the substratum of the of the suit no longer exists and the reliefs sought in the plaint have been overtaken by events. The Defendants averred that the continued pendency of the suit only serves to unnecessarily clog the court system and is prejudicial to the Defendants who continue to incur costs attending the same.

From the court record, it is apparent that the application was not opposed by the Plaintiffs who neither filed a replying affidavit nor grounds of opposition despite the fact that their counsel was served with the notice of motion as indicated in the affidavit of service sworn by Julius Muchangi Gaturu, the process server on 14/3/2019.

A brief history of the case is that the Plaintiffs filed a notice of motion dated 15th November 2017 under certificate of urgency seeking injunctive orders to restrain the Defendants, their agents, assigns or successors in title from trespassing into, remaining upon, developing, alienating, selling, auctioning, transferring or in any manner whatsoever interfering with the 1st Plaintiff's proprietary interest in and peaceful enjoyment of Nairobi Block 140/288/103 Fansi Road, Nyayo Embakasi Estate, Nairobi, pending the hearing and determination of the application and the suit. The application was made on the ground that at the time the 1st Defendant advanced the loan facility to the 1st Plaintiff in 2015 the abovementioned property was valued at Kshs. 7,500,000/= hence the acceptance to grant Kshs. 5,000,000/= and in seeking to sell the property at Kshs. 5,625,000/= the Defendants would be selling it at a gross undervalue and a brazen deprivation of the Plaintiffs suit property. The application was supported by the affidavit of the 2nd Plaintiff who is a director of the 1st Plaintiff. She averred that she had never been served with any statutory notices by the 1st Defendant. In the plaint dated 15th November 2017, the Plaintiff averred that the intended sale of the suit land did not comply with legal procedures and relied on Sections 91(1), (2), (3) of the Land Act and Article 40(2) of the Constitution.

The Plaintiff sought an injunction to restrain the 1st Defendant from dealing in the suit property unless it was in compliance with Section 7 of the Land Act; a mandatory injunction compelling the 2nd Defendant and the 1st Plaintiff to carry out a joint valuation of the suit property and for the court to extend the time period for the 1st Plaintiff to comply with the statutory notices served by the 1st Defendant.

The legal officer of the 1st Defendant swore the replying affidavit dated 20/11/2017 on behalf of the Defendants where he deponed that the suit should be struck out with costs because the claim against the 2nd Defendant as the agent of the 1st Defendant was not tenable and that the suit offended the provisions of Order 1 Rule 13(2) of the Civil Procedure Rules. Further, that the 1st Plaintiff is not in the category of persons or entities permitted under Section 103 of the Land Act 2012 to apply for such relief.

The legal officer of the 1st Defendant further averred that the 1st Plaintiff applied to the 1st Defendant for renewal of the overdraft facility which was granted for one more year, and was secured by the existing legal charge over the suit property. However, this renewed overdraft facility was not operated within the sanctioned limits prompting the 1st Defendant to issue to the Plaintiffs a formal demand letter recalling the facility. The Plaintiffs failed to regularise the 1st Plaintiff's account which led the 1st Defendant to issue the Plaintiffs and their guarantor a statutory notice dated 13/2/2017. When the statutory notice lapsed without any action from the 1st Plaintiff, the 1st Defendant issued a notice to sell dated 14/6/2017 and later caused a 45 days' redemption notice and notification of sale to be delivered to the suit property on 21/9/2017. The 1st Defendant had the property valued and the valuation report dated 7/8/2017 placed an open market value of Kshs. 7,500,000/= and a forced sale value of Kshs. 5,625,000/= on the suit property.

Furthermore, the 1st Defendant's legal officer averred that the 1st Plaintiff's outstanding debt outstripped the value of the property by almost Kshs. 2,000,000/= and averred that any further delay placed the chargee at a great disadvantage and that the 1st Defendant was entitled to exercise its statutory power of sale.

The Court examined the evidence tendered by both parties and found that the Plaintiffs failed to demonstrate a *prima facie* case against the Defendants and declined to grant the injunctive orders sought in a ruling delivered on 30/11/2017. The court record shows that the Plaintiffs last appeared in court on 30/11/2017 when the ruling on the application for injunction was delivered. The Plaintiffs' counsel then sought stay of execution for 14 days as well as copies of the proceedings. The Court directed that these be supplied upon payment of the requisite fees and that the matter be mentioned before the Deputy Registrar for pre-trial directions. On 20/2/2018 the Plaintiffs counsel failed to appear and the Defendants informed the court that summons to enter appearance were yet to be taken out by the Plaintiffs. On 5/4/2018 the matter came up again for pre-trial directions but neither of the parties appeared. On 20/2/2019 the matter came up and only the Defendants' counsel attended court. They argued their instant application out.

Order 17 rule 2 of the Civil Procedure Rules provides that in any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit. Where cause is shown to the satisfaction of the court it may make such orders as it thinks fit to ensure the expeditious hearing of the suit. Any party to the suit may also apply for its dismissal and the court may dismiss the suit for non-compliance with any direction given under order 17.

In **Naftali Onyango v National Bank of Kenya [2005] eKLR**, the court reiterated the burden of proof a defendant seeking dismissal of a suit for want of prosecution must discharge. Citing Salmon L.J. in **Allen v Sir Alfred McAlpine & Sons LTD All ER [1968] 1 543 F.** Azangalala J. stated: "*The defendant must show:*

- i) That there had been inordinate delay. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.*
- ii) That this inordinate delay is inexcusable. As a rule, until a credible excuse is made out the natural inference would be that it is inexcusable.*
- iii) That the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff or between each other or between themselves and third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of prejudice at trial."*

The Court has considered the application, the supporting affidavit as well as the court record and finds that the Defendants' application to dismiss the suit for want of prosecution is merited and allows it with costs to the 1st Defendant.

Dated and delivered at Nairobi this 8th day of April 2019.

K. BOR

JUDGE

In the presence of: -

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiffs and Defendants